Supreme Court, U.S.
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No. 93-2000

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

IRVING M. PATZ

and

ANDREW D. PATZ,

Petitioner,

V.

HOLLIDAYSBURG TRUST CO.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether Petitioners had any constitutionally protected privacy right or interest in negotiated bank money orders sufficient to form the basis of an action under 42 U.S.C. §1983.

2. Whether a bank's surrender of negotiated money orders to a police officer during a criminal investigation pursuant to a search warrant is an action by the bank under the color of state law sufficient to subject the bank to liability under 42 U.S.C. §1983.

3. Whether the District Court and Court of Appeals correctly dismissed Petitioner's pro se complaint pursuant to F.R.Civ.P.12(b) where it was held to be legally without merit?

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COUNTER-STATEMENT OF THE CASE

Petitioners filed this action in the United States District Court for the Western District of Pennsylvania, pro se, generally alleging that the Respondent, Hollidaysburg Trust Company,[1] somehow violated various "constitutional" rights by providing negotiated bank instruments to the police department pursuant to a search warrant. The local police department had sought the instruments in the course of their investigation concerning the theft of funds from Petitioner, Irving Patz's, employer.

Petitioners were eventually arrested and charged with theft. Prior to their criminal trial in the court of Common Pleas of Blair County, Pennsylvania, Petitioners filed a motion to suppress the evidence of money orders which had been provided to the police

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[1] Respondent, Hollidaysburg Trust Company, is a 100% owned subsidiary of Penn Central Bancorp., Inc.

by Hollidaysburg Trust Company pursuant to a search warrant. The motion to suppress was denied by the state trial criminal court. Following Petitioners' criminal trial, no appeal was taken by either Petitioner on the issue of the suppression of the bank records. Petitioner claims that his attorney at the criminal trial failed to brief the issue and lost the right to appeal that ruling.[2]

While Petitioner Irving Patz was incarcerated in a state prison in Mercer, Pennsylvania and Andrew Patz was living in Houston, Texas on probation, Petitioners filed this civil rights action against respondent, Hollidaysburg Trust Company, in an improper and misdirected attempt to collaterally chal-

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[2] It is interesting to note that, at the same time, Petitioners appear to claim that they were not convicted of any charges which arose out of the respondent's turning over records. Petitioner Irving Patz alleges he is incarcerated as a result of a conviction on unrelated charges. Petition for Writ of Certiorari, pp. 11-12.

lenge the state criminal trial court's decision in the suppression hearing.

Petitioners filed a pro se complaint and a motion to amend complaint, apparently attempting to plead a civil rights claim under 42 U.S. §1983. Petitioners generally alleged that respondent violated a "contractual duty of confidentiality", the 1st, 4th, 5th, 6th, 9th and 14th Amendments to the United States Constitution and the Pennsylvania Constitution, Article 1, Section 8, by providing Petitioners' negotiated money orders to the Hollidaysburg policy department.[3]

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[3] In their Petition for Writ of Certiorari, Petitioners claim only violations of their 4th, 5th, 9th, and 14th Amendment rights, although there is no discussion in the Petition as to the specifics of any of the alleged violations. Therefore, Petitioner has waived any claim under the 1st or 6th Amendments. Petitioners claims of violation of a "contractual duty of confidentiality" and the Pennsylvania constitution cannot be the basis of a §1983 action as they do not involve rights secured by the constitution or laws of the United States

Respondent filed a motion to dismiss in the District Court, on the basis that Petitioners failed to state a claim upon which relief could be granted, because there was no constitutionally protected right in negotiated instruments and that Respondent did not act under color of state law as required by 42 U.S.C. §1983.

The District Court, after consideration of both Petitioners' initial complaint and a motion to amend complaint, held that, even if Petitioners' conclusory allegations are accepted as true, there was no basis on which it could be held that respondent acted under color of state law, and therefore, the court lacked jurisdiction over the claim pursuant to 28 U.S.C. §1343(a)(3).

The Petitioners then appealed the District Court's decision to the United States Court of Appeals for the Third Circuit. The Court of Appeals for the Third Circuit affirmed the judgment of the District Court. Petitioners filed a motion to reconsider and

a motion for mandatory injunction which were both denied by the Court of Appeals for the Third Circuit. The Third circuit denied the Motion for Mandatory Injunction without prejudice to the right of the Petitioner to fie pleadings before the criminal court in which the search was conducted.

REASONS FOR DENYING THE PETITION

The Petitioners' civil rights action fails because it lacks both the elements required to bring an action under 42 U.S.C. §1983; (1) the infringement of a constitutionally protected interest, and (2) action under color of state law by a private person.

Additionally, appellant's pro se complaint and motion to amend complaint extensively set forth the basis of their claim. The courts below gave Petitioners the benefit of all inferences from the complaint and motion and considered all the evidence included within the complaint and motion to amend complaint. The courts below properly dis-

missed the action under F.R.Civ.P.12(b) as without legal merit, rather than due to technical deficiency.

Lastly, this action does not involve a question of general importance or a conflict on an important issue between the circuits which would merit review by this Court. This case was properly and fairly decided by the courts below and the Petition for Writ of Certiorari should be denied.

I. PETITIONERS' CLAIM LACKS THE REQUIRED ELEMENTS OF A 42 U.S.C. §1983 ACTION, AS THERE WAS NO DEPRIVATION OF A PROTECTED RIGHT AND NO "STATE ACTION" AND PETITIONERS' ACTION WAS PROPERLY DISMISSED.

This lawsuit is a misguided attempt to re-litigate or, in effect, "appeal" the state criminal trial court's ruling on the Petitioners' motion to suppress. Having failed to preserve the issue of the admissibility of the bank records for appeal in the state criminal court, Petitioners are now improperly attempting to re-litigate this issue in this action against a bystander to

the criminal trial, your Respondent, Hollidaysburg Trust Company.

The genesis of this action is that Hollidaysburg Trust Company provided negotiated money orders to the Hollidaysburg, Pennsylvania Police Department. This conduct cannot be the basis of a civil rights action pursuant to 42 U.S.C. §1983.

A §1983 action has two basic elements,

1. Plaintiff is bound to show that he has been deprived of a right "secured by the constitution and the laws of the Untied States".

2. Plaintiff must show that a private party deprived them of that right acting under color of any statute of a state. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978).

Petitioners' claim fails to satisfy either of these elements. This Court has previously held that there is no constitutional protection of bank records by virtue of the 4th Amendment. United Sates vs. Miller, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). The Defendant in Miller argued that federal agents had violated his 4th Amendment

rights by seizing his banking and checking records. In rejecting the defendant's argument, the Court stated in relevant part:

> The checks are not confidential communications but negotiable instruments to be used in commercial transactions...The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government.
> 425 U.S. at 442-445.

In Miller, this Court expressly rejected any "expectation of privacy" in bank records which contain information voluntarily conveyed to banks, and held that the 4th Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Governmental authorities. 425 U.S. at 441-443.

Petitioners' citation of Commonwealth vs. DeJohn, 486 Pa. 32, 403 A.2d 1283, cert. den. DeJohn vs. Pennsylvania, 444 U.S. 1032, 100 S.Ct. 704, 62 L.Ed.2d 668 (1979), is a futile and improper attempt to create a conflict

between this Court and a state court of last resort concerning privacy rights in bank instruments. DeJohn was decided by the Pennsylvania Supreme Court solely on Pennsylvania state constitutional grounds.

Petitioners' claims also fail the second element required of a §1983 action. The lower court correctly held that respondent did not act "under color of state law" to deprive a Petitioner of any right. In fact, Petitioners expressly allege in their petition that Respondent acted in violation of, and not in accord with, state law. (See, Petition for Writ of Certiorari, Questions Presented, No. 2). This is inconsistent with a claim of action under color of state law, and is fatal to Petitioners' claims.

In Lugar v. Edmondson Oil Company, 457 U.S. 922, 102 S.Ct. 2744, 72 L.Ed.2d 482 (1982), cited by the District Court, a Petitioner brought a §1983 action against a creditor who had obtained a writ of attachment, sequestering Petitioner's property pursuant to

Virginia law. The Petitioner alleged that, in attaching his property, the creditor acted jointly with the state to deprive Petitioner of his property without due process of law. Id. at 924-925.

The Supreme Court held that insofar as Petitioner alleged only misuse or abuse by the respondents of Virginia law, he did not state a claim under §1983, but instead challenged only private action. This was so because the alleged conduct could not be ascribed to any governmental decisions; neither did respondents have the authority of state officials to put the weight of the state behind their decision. Id. at 940. In other words, to say that an act is "unlawful under state law" is to say that the conduct cannot be attributed to the state. Id.

Petitioners cite the decision of this Court in Adickes vs. S. H. Kress & Company, 398 U.S. 144, S.Ct. 1598, 26 L.Ed.2d 142 (1978) in an attempt to find state action. Adickes is clearly distinguishable from this

decision and does not conflict with either the Lugar decision or the Third circuit's decision in this case. Adickes involved a §1983 action alleging a conspiracy between a restaurant owner and the local police to deprive Ms. Adickes of her constitutional right to eat with black individuals in a public restaurant in Mississippi. Any attempt to analogize the facts of Adickes with those in the present matter must fail. The providing of bank records in which there is no constitutional protection cannot be equated with the refusal to serve persons based on their race in a public restaurant.

On the contrary, the lower court's decision is consistent with the decision of another circuit in a similar case. In Fonda vs. Gray, 707 F.2d 435 (9th Cir. 1983), the Court of Appeals for the Ninth Circuit held that a bank could not be liable under §1983 when the bank's actions were responsive to a request of the FBI to view Jane Fonda's bank records, as the state action requirement was

not met by the bank's mere compliance with a government official's request.

Finally, Petitioners claim they were held to some "higher standard of pleading" as pro se plaintiffs. On this issue, petitioners attempt to create a conflict between this case and Haines vs. Kearner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), which held that a prisoner could not be said to be unable to prove a set of facts in support of his claim that would entitle him to relief. The Petitioner in Haines alleged that he had been denied due process by being placed in solitary confinement as a disciplinary measure at a state prison.

In the contrast to Haines, the District Court and the Third Circuit gave Petitioners the benefit of every inference from their complaint and Motion to Amend Complaint, and did not base a judgment on any technical deficiency in the pleadings. Rather, the

claim lacked legal merit for the reasons stated above.[4]

CONCLUSION

Petitioners' Petition for Writ of Certiorari to the United States Supreme Court should be denied. The Petitioners' claims are entirely without merit and have no national or constitutional significance. The issues have been previously adjudicated and the rulings of the courts below are consistent with prior decisions of this Court and relevant decisions in the various Circuits.

Respectfully submitted,

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[4] Petitioners' 5th and 9th Amendment claims have not been briefed, are waived, and, at any rate, are baseless and completely unfounded, as the actions of a private party cannot serve as the basis of a claim under these amendments. Petitioners 14th Amendment claim necessarily fails as there is no state action.